IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 30 of 1997

in

COMPANY PETITIONNo 42 of 1994

Hon'ble MR.JUSTICE Y.B.BHATT

and

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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PURSHOTTAM NAROTTAMDAS GURJAR

Versus

MANEKLAL VITHHALDAS SHAH

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Appearance:

MR RD DAVE for Appellant

MR SN SOPARKAR WITH MR HARESH J TRIVEDI for Respondents.

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CORAM : MR.JUSTICE Y.B.BHATT and

MR.JUSTICE R.P.DHOLAKIA

Date of decision: 13/07/98

ORAL JUDGEMENT (Per Y.B. Bhatt J.)

1. The appellant herein is the original petitioner who had filed a petition under section 397/398 of the Companies Act before the Company Law Board (hereinafter referred to as CLB) complaining of oppression against him as a minority shareholder and mismanagement on the part of the first respondent in respect of the second respondent Company. The CLB, on a total appreciation of the evidentiary material on record and on hearing the respective parties, dismissed the petition on merits. It is this order which is the subject matter of the present appeal on the part of the appellant-original petitioner, under section 10F of the Companies Act, 1956.

2. After issuing notice in the appeal we have heard the learned counsel for the respective parties, and have perused such evidentiary material to which our attention has been drawn by the respective counsel. In the first instance we may note that this is an appeal under section 10F of the Companies Act and on a plain reading thereof, it is obvious that such an appeal would lie "on any question of law arising out of such order".

3. As a result of the hearing and discussion we find that there is no question of law which arises in the present matter. Even the submissions made by the learned counsel for the appellant, considered with the grounds taken in the memo of appeal, have failed to satisfy us that any question of law could possibly arise.

4. In this context we may also note that the learned counsel for the appellant has sought to urge that the CLB has misappreciated the evidentiary material on record to such an extent that this would itself amount to a question of law. Although we do not agree with this submission (in so far as the proposition is concerned), in order to satisfy the conscience of the court, we have also heard the learned counsel for the parties on questions of fact, and the findings of fact recorded by the CLB.

5. We also note that the petition filed before the CLB under section 397/398 was filed by the present appellant as the sole applicant-petitioner. As the sole applicant-petitioner it was his contention that he had approached the CLB for appropriate reliefs under the said provisions as a minority shareholder, on the grounds sought to be made out in the petition. No doubt, a sole petitioner can maintain such a petition, and on the facts of the case we do not doubt that the petition was maintainable. However, during the course of discussion it becomes apparent, and there is no controversy on the

point, that the petitioner, his father, his wife and his son together held shares amounting to 49% of the issued, subscribed and paid up capital of the second respondent company. It was stated at the bar by the learned counsel for the appellant that the petitioner's father, wife and son held only a few nominal shares, and that the petitioner held approximately 48% of the total shareholding. Although we do not emphasise the point, it did occur to us as to why a grievance of oppression of the minority shareholders, as made in the petition under section 397/398, is made by the appellant-petitioner alone without joining the other minority shareholders as co-petitioners or even as respondents in the said petition. To this question there was no clear reply by learned counsel for the appellant. He merely sought to suggest that the appellant-petitioner in his own right could maintain the petition (in respect of which we have no doubt), and that as such he represents all the minority shareholders. However, looking to the record of the case and also looking to the substance of the contentions taken, raised and argued, we cannot but observe that the appellant-petitioner has pursued the cause as a minority shareholder as an individual and not for and on behalf of the minority shareholders. As aforesaid, this aspect we do not over-emphasise, but only retain at the back of our minds, where it may raise other questions such as why the other minority shareholders and family members of the appellant petitioner are not interested in the petition. There is no direct answer to the question and we do not wish to draw any conclusions on the basis of surmises. Yet an indication is available from other factors discussed hereinafter.

6. It is on record as also seen from the impugned order that even while the proceedings were pending before the CLB, efforts were made to settle the matter and/or to bring about a settlement between the two sides which had fallen out, inasmuch as the second respondent company is a Private Limited Company, and for all practical purposes the appellant petitioner held 49% of the shares and the first respondent for all practical purposes held 51% of the shares. In this context the CLB had occasion to record in the impugned judgement and order that the settlement talks and proposals have failed.

7. Even before us, a number of attempts were made to bring about a settlement, which, however, did not bear fruit. As aforesaid, we may not draw any conclusions from this state of affairs. Yet it is possible that the appellant petitioner and the first respondent, being the only two Directors of the Company, have so fallen out

with each other for personal reasons, that no settlement is possible.

8. This takes us to the merits of the present appeal. As aforesaid, we have examined the impugned judgement with the assistance of learned counsel for the respective parties, with the aid of such evidentiary material to which our attention has been drawn, and in the ultimate analysis, we find that no justification for interference in the present appeal under section 10F of the Companies Act is made out.

9. In the context of the various decisions cited by respective counsel which we shall refer to hereinafter, there cannot be any controversy as to the scope and ambit of section 397/398 of the Companies Act, reliefs which can be afforded under the said provisions, and what is more important, the aims and objects of this piece of legislation. It is by now a well settled principle in law that the said provisions are brought into play to safeguard the interest of the minority shareholders, and if possible to avoid the demise of a company which is otherwise a running company, as an alternative to winding up the company. In other words, the company which is otherwise liable to be wound up on the facts of the case, may not be wound up if the minority shareholders are more likely to suffer if such an action was taken. In this context, it is also a well settled proposition that such a situation would only prevail in the case of an on-going concern which otherwise is in no danger of dying out and requires to be saved from winding up due to internal dissentions. The the same cannot be said in respect of a company which is already dead and defunct, and is only awaiting formal winding up orders at the instance of an appropriate petitioner. On the facts of the case there is no controversy that even in the accounting year 1990-91, the company had done practically no business whatsoever, and that on closing of the accounts on 31st March 1991, the company had in fact become defunct. Admittedly, it has not done any business whatsoever after 31st March 1991. In this context it is significant to note that the petition under section 397/398 came to be filed in the year 1994. Thus, for three years, and even thereafter till the present date, the company is a dead company, and has done no business whatsoever. Thus, on the facts and in the circumstances of the case, we have no doubt whatsoever that even if facts and circumstances justified the grant of any relief whatsoever to the petitioner, the company would remain a dead company, and for that reason as well the reliefs contemplated under section 397/398 could not and would not protect the

interest of the minority shareholders whatsoever.

10. Learned counsel for the appellant sought to rely upon a decision of the Madras High Court in the case of Balasundaram Vs. New Theatres Carnatic Talkies, reported at 77 Company Cases 234. Learned counsel for the appellant has mainly sought to rely upon this decision to emphasise as to what reliefs could be granted under section 397/398, and sought to urge that on the facts of the cited case such reliefs were available to the appellant petitioner and should have been granted by the CLB.

10.1 Firstly, we note that the cited decision, after examining the scope of section 397/398, has afforded reliefs to the petitioners therein, almost entirely on the facts of that case. The second aspect which requires to be noted is that the Madras High Court has granted reliefs under section 397/398 also because the company in question was a going concern, and was not defunct, or even otherwise liable to be wound up. In our opinion, therefore, this decision would not be of any assistance to the learned counsel for the appellant.

10.2 Secondly, there is a significant difference between the jurisdiction of the CLB under sections 397/398, and our jurisdiction under section 10F. The CLB was exercising jurisdiction that was substantially discretionary - depending on its own factual findings. We, under section 10F, cannot exercise such jurisdiction unless we find justification for setting aside all the factual findings recorded by the CLB.

11. Our attention has been drawn to a decision of this Court in the case of Mohanlal Vs. SSJ Cotton & Jute Mills, reported at AIR 1965 Gujarat 96, decided by P.N. Bhagwati J (as he then was).

11.1 After examining the scope and ambit of section 397/398 of the Companies Act, in paragraph 27 of the cited decision, the court had occasion to observe as under:

> "The language of Sections 397/398 leaves no doubt as to the true intendment of the Legislature and it is transparent that the remedy provided by these sections is of a preventive nature so as to bring to an end oppression or mismanagement on the part of controlling shareholders and not to allow its continuance to the detriment of the aggrieved shareholders or the Company. The remedy

is not intended to enable the aggrieved shareholders to set at naught what has already been done by controlling shareholders in the management of the affairs of the company."

It is in the context of these observations that we have indicated hereinabove that the proceedings under section 397/398, being in the nature of a quia timet action, the only purpose of which is to prevent a deterioration in the affairs of a company, which would otherwise possibly land the company as such into larger and greater difficulties, including being wound up. However, the emphasis is on the aspect that these provisions as a statutory remedy are not intended to set back the clock, and indeed, on the facts of the case, cannot set back the clock, inasmuch as the company which has been defunct for at least three years on the date of the petition, and for seven years till date, cannot become a healthy and flourishing company even if such reliefs could be granted.

11.2 These observations in the case of Mohanlal (supra) were approved by the Supreme Court in its decision in the case of Needle Industries (India) Ltd. Vs. Needle Industries Newey (India) Holdings Ltd and others, reported at AIR 1981, SC 1298.

11.3 In paragraph 49 of the said decision, their Lordships of the Supreme Court quoted with approval the observations of P.N. Bhagwati J. (as he then was) in the case of Mohanlal (supra), and then quoted with approval the observations of Lord President Cooper in Elder Vs. Elder (1952) SC 49.

11.4 Thereafter in paragraph 51 of the said decision, their Lordships of the Supreme Court had occasion to observe as under:

"There must be continuous acts on the part of the majority shareholders, continuing up to the date of the petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members."

It is in the context of these observations that we find that the reliefs under section 397/398, even if affordable to the petitioner, would not set things right. Firstly, the findings of fact recorded by the CLB do not justify any interference on our part on an assumption that the majority shareholder viz. the first respondent herein, has committed continuous acts, continuing upto

the date of the petition, and that the same were prejudicial to the affairs of the company. As the facts stand, what could be more prejudicial to a company than the fact that it is a defunct company and has been for a period of three years prior to the filing of the petition? There is also not a slightest hint that any business has been transacted thereafter till the present date.

12. The learned counsel for the appellant then contended that the jurisdiction of the CLB under section 397/398 was also an equitable jurisdiction, and that in the impugned judgement and order, this principle has not been followed. The only interpretation we can give to this submission on the part of the learned counsel for the appellant, is that from his perspective, the principles of equity have been abandoned merely because the reliefs as sought by the petitioner, have not been granted . On the facts of the case we find that the CLB has examined all the relevant facts and circumstances on the basis of the evidentiary material on record, and has thereafter arrived at findings of fact, which we are required to uphold. Surely we would not expect any judicial forum to exercise equitable jurisdiction, even if the facts did not justify its exercise.

13. In the premises aforesaid, there is no substance in the present appeal and the same is, therefore, dismissed. Notice is discharged with no order as to costs.

14. At this stage a request was made on behalf of the learned counsel for the appellant that in case the appellant petitioner desires to approach the Supreme Court, appropriate orders may be passed herein to protect his interest in the meanwhile. We consider this request to be unsustainable for the simple reason that no interim orders were passed in the present appeal even when notice was issued. As a matter of fact no application whatsoever had been preferred for the purpose of obtaining any interim relief. Furthermore, even the CLB had not granted any interim relief to the appellant petitioner. Under the circumstances we cannot now pass any fresh orders for the first time, without causing prejudice to the respondents. This request is, therefore, rejected.

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